No. 04-1480

JUN 1 - 2005

In The
Supreme Court of the United States

DOUGLAS B. MOYLAN
Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Attorneys at Law
238 A.F.C. Flores Street
Suite 801, Pacific News Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Supreme Court of Guam erred in holding that the Organic Act's description of the Guam Attorney General as "Chief Legal Officer" does not preclude the Guam Legislature from allowing Guam government agencies, such as Respondent GIAA, to retain private counsel.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
ADDITIONAL RELEVANT STATUTORY PROVISION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE PETITION	8
I. THE LACK OF A DECISION FROM AN ARTICLE III COURT FURNISHES NO REASON FOR GRANTING *CERTIORARI*	9
A. Guam Courts are Competent to Address Federal Law	9
B. This Court is Reluctant to Review Territorial Decisions of Local Concern	10
C. This Case Does Not Involve Federal Jurisdictional Issues	12
D. The "Article III" Issue was Not Pressed or Passed Upon Below	13
II. THE SUPREME COURT OF GUAM'S OPINION DOES NOT DEVIATE FROM THIS COURT'S PRECEDENTS	14
III. THE SUPREME COURT OF GUAM'S OPINION DOES NOT CONFLICT WITH NINTH CIRCUIT RULINGS	15

TABLE OF CONTENTS – Continued

Page

IV. THE SUPREME COURT OF GUAM DID NOT ERR IN FINDING THAT THE ORGANIC ACT PERMITS THE GUAM LEGISLATURE TO LIMIT THE POWERS OF THE ATTORNEY GENERAL 18

A. The Powers of a Constitutionally-Elected Attorney General May be Limited by Legislatures 19

B. A Legislature May Permit Government Agencies to Retain Independent Counsel... 20

C. The Designation of the Attorney General as "Chief Legal Officer" Does Not Prohibit Guam's Legislature from Allowing Autonomous Agencies to Retain Independent Counsel 22

D. Guam Law has Not been Preempted by Federal Law 25

1. Federal preemption requires a "clear and manifest" intention of Congress..... 25

2. The express language of the Organic Act does not prohibit Guam's Legislature from allowing autonomous agencies to retain independent counsel..... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) (*per curiam*)..... 13

Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.), D. Guam Civ. Case No. 03-00008 (Order, April 1, 2003)..... 1, 6, 12

Board of Public Utility Commissioners of New Jersey v. Lehigh Valley, 149 A. 263 (N.J. 1930)..... 20

Bordallo v. Baldwin, 624 F.2d 932 (9th Cir. 1980) 16, 17

Chase Manhattan Bank (N.A.) v. South Acres Dev. Co., 434 U.S. 236 (1978)..... 14, 15

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)..... 25

City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424 (2002)..... 26

English v. Gen. Elect. Co., 496 U.S. 72 (1990)..... 25

Fisher v. United States, 328 U.S. 463 (1946)..... 10

Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (*en banc*)..... 10

Griffin v. United States, 336 U.S. 704 (1949)..... 10

Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002)..... 11

Gutierrez v. Ada, 528 U.S. 250 (2000)..... 15

Gutierrez v. Pangelinan, 276 F.3d 539 (9th Cir. 2002)..... 11

Hansen v. Utah State Retirement Board, 652 P.2d 1332 (Utah 1982)..... 20

Holland v. Watson, 14 So.2d 200 (Fla. 1943)..... 24

Howell v. Mississippi, ___ U.S. ___, 125 S. Ct. 856 (2005)..... 13

TABLE OF AUTHORITIES – Continued

Page

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)..... 15

Johnson v. Commonwealth, et al., 165 S.W.2d 820 (Ky. 1942)..... 19

Maryland v. Louisiana, 451 U.S. 725 (1981)..... 25

Miller v. United States, 357 U.S. 301 (1958)..... 10

Moore v. Sims, 442 U.S. 415 (1979)..... 9

Nelson v. Ada, 878 F.2d 277 (9th Cir. 1989)..... 16, 17

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)..... 26

Nguyen v. United States, 539 U.S. 69 (2003)..... 9

People v. Santa Clara Lumber Co., 110 N.Y.S. 280 (N.Y. 1908)..... 21

Pernell v. Southall Realty, 416 U.S. 363 (1974)..... 7, 10, 11

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976)..... 18

In re: Request of Governor Camacho, rel. to the Interpretation and Application of Sections 6 and 9 of the Organic Act, 2004 Guam 10 at ¶ 38, 2004 WL 1293239..... 23

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)..... 25

Saint v. Allen, 134 So. 246 (La. 1931)..... 28, 29

Schwartz v. Texas, 344 U.S. 199 (1952)..... 26

Shute v. Frohmiller, 90 P.2d 998 (Ariz. 1939)..... 20

Silver v. New York Stock Exchange, 373 U.S. 341 (1963)..... 19

State Compensation Insurance Fund v. Riley, 69 P.2d 985 (Cal. 1937)..... 21

TABLE OF AUTHORITIES – Continued

Page

State of Florida ex rel. Shevin v. Yarborough, 257 So.2d 891 (Fla. 1972) 24

State of Missouri ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857 (Mo. 1943) 19

State of North Dakota v. Erickson, 7 N.W.2d 865 (N.D. 1943) 19

State of Oklahoma v. Georgia-Pacific Corp., 663 P.2d 718 (Okla. 1982) 24

Territory of Guam v. Olsen, 431 U.S. 195 (1977) 12, 14

U.S. v. Borden Co., 308 U.S. 188 (1939) 18

Watson v. Caldwell, 27 So.2d 524 (Fla. 1946) 24

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 25, 26

Woodahl v. State Highway Commission, 465 P.2d 818 (Mont. 1970) 23, 24

STATUTES:

28 U.S.C. § 2201 6

48 U.S.C. § 1421(a) 16

48 U.S.C. § 1421g(a) 16

48 U.S.C. § 1421g(d)(1) 3

48 U.S.C. § 1421g(2) 27, 28

48 U.S.C. § 1422 ..... 22, 28

48 U.S.C. § 1423a 5, 16

2 G.A.R. § 2113 21

TABLE OF AUTHORITIES – Continued

Page

5 G.C.A. § 5121(b) 21

5 G.C.A. § 5150 21

5 G.C.A. § 30109 ..... 2, 17, 22

5 G.C.A. § 30109(c) 17, 21

12 G.C.A. § 1108(a) 21

12 G.C.A. § 1108(d) 21

RULES:

Sup. Ct. R. 10 ..... 8, 18

OTHER AUTHORITIES:

H.R. Rep. No. 105-742 (1998) 5

SINGER, SUTHERLAND STAT. CONSTR., § 23.21 (2002 ed.) 25

SINGER, SUTHERLAND STAT. CONSTR., § 23.22 (2002 ed.) 26

SINGER, SUTHERLAND STAT. CONSTR., § 5105 27

OPINIONS BELOW

Respondent adopts and incorporates Petitioner's statement in this regard, with the following addition concerning a closely-related case. One federal court has already faced the identical issues presented in this case and decided to abstain from ruling on them in deference to the Guam courts' rulings. In that case, *Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.)*, D. Guam Civ. Case No. 03-00008 (Order, April 1, 2003),[1] the District Court of Guam held that the *Younger* and *Burford* abstention doctrines, as well as the Declaratory Judgment Act, counseled against federal court consideration of the identical issues raised in the case *sub judice*. In dismissing the federal suit, the district court stated, "[t]he federal court will not get embroiled in this 'intra-governmental dispute' between the Attorney General and the Executive Branch." Resp. App. p. 12. The Attorney General took an appeal from the order dismissing the case; and the matter was argued and submitted to the Ninth Circuit Court of Appeals on May 11, 2005. (*See* Docket Nos. 03-15823; 03-15999.) The appeal remains pending as of the date of this brief.

ADDITIONAL RELEVANT STATUTORY PROVISION

Respondent hereby adopts the Attorney General's recitation of "Relevant Statutory Provisions."[2] However, there was at least one notable omission from that recitation which Respondent would like to address. The Attorney General neglected to set forth the text of the provision

[1] The text of this unpublished disposition appears in the Appendix.

[2] *See* Pet. 2-7.

of Guam law which expressly sets forth the duties of the Attorney General. The applicable provision reads as follows:

> § 30109. Duties.
>
> The Attorney General is the public prosecutor and, by himself, a deputy or assistant, shall:
>
> (a) Conduct on behalf of the Government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in any of the courts of Guam, the District Court of Guam, and any appeals therefrom.
>
> (b) Draw all informations, conduct grand jury proceedings, prosecute all recognizances forfeited in the courts and all actions for the recovery of debts, fines, penalties and forfeitures accruing to the government of Guam, except as otherwise provided in this Act;
>
> (c) Conduct on behalf of the government of Guam all civil actions in which the government is an interested party; **provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.**
>
> (d) Deliver receipts of money or property received by him in his official capacity and file duplicates thereof with the Director of Administration;
>
> (e) As soon as practical after the receipt of any money in his official capacity, turn the money over to the Director of Revenue and Taxation, and on the first Monday of each month file with the Director of Administration, an account, verified by his oath, of all monies received by him

in his official capacity for the government of Guam during the preceding month;

(f) Be diligent in protecting the rights and properties of the government of Guam;

(g) Institute by any appropriate action proceedings on behalf of himself or any other public officer (not an employee) to have determined by the courts the validity of any law, rule or regulation of the government of Guam; and

(h) Perform such other duties as are required by law. [Emphasis added.]

STATEMENT OF THE CASE

This case below involved a straight-forward task of statutory construction. In 1998, Guam's Organic Act was amended to allow for the election of an Attorney General. 48 U.S.C. Section 1421g(d)(1). The language in this Amendment, so heavily relied upon by the Attorney General, says nothing about his "powers and duties." It merely states: "The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." There is nothing in this language or any other part of the Organic Act that "explicitly" prohibits the Guam Legislature from enacting legislation to permit autonomous government agencies to retain independent counsel.

The legislative history supports Respondent A.B. Won Pat Guam International Airport Authority's ("GIAA") contention that Guam's Legislature may decide whether to permit certain government agencies to retain independent counsel. On July 16, 1997, prior to the 1998 amendment, Guam's Compiler of Laws sent a letter to Guam's delegate in

Congress explaining that he did not see the proposed designation of the Guam Attorney General as "Chief Legal Officer" as eliminating the use of outside counsel for various agencies:

> I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the government of Guam.[3]

In another letter dated September 2, 1997, discussing the proposed amendment to the Organic Act at issue herein, Guam's Compiler of Laws explained to Guam's congressional delegate that it was "rightfully" a matter of "local legislation" whether to allow government agencies to retain independent counsel:

> There are a number of local problems, *rightfully the subject of local legislation,* that need addressing. Such include the relationship between the Attorney General and counsel assigned or and/or hired by individual agencies, their funding, etc.[4]

The letters of July 16, 1997, and September 2, 1997, are the only two references in the legislative history to the 1998 Amendment that make any reference to the ability of government agencies to retain independent counsel. One of these letters plainly states that the proposed amendments to the Organic Act do not eliminate "the use of outside counsel for various agencies." The other letter is equally clear in declaring the "relationship" between the

---

[3] Appellant's Excerpts of Record (Sup. Ct. of Guam 6/14/04), at p. 36.

[4] Appellant's Excerpts of Record (Sup. Ct. of Guam 6/14/04), at p. 38.

Attorney General and independent counsel a rightful "subject of local legislation."

In fact, rather than restricting the powers of Guam's Legislature, the 1998 amendment to the Organic Act expanded those powers. H.R. Rep. No. 105-742 (1998) explicitly acknowledges that the same bill which created the position of the elected Attorney General also contained a provision amending the Organic Act so as to broaden the extent of the Legislature's powers:

> H.R. 2370 would amend the Organic Act of Guam to allow its legislature to enact a law providing for the election of the island's attorney general, specify that simple majority of legislators qualifies as quorum, and *broaden the extent of the legislature's powers.*[5]

To this end, the same law that amended the Organic Act to permit for an elected Attorney General also amended the Organic Act to clarify that the legislative power of Guam's Legislature shall extend to all "rightful subjects of legislation not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a, *as amended by* GUAM PUB. L. 105-291:4. By undeniably granting the Guam Legislature power to legislate "all rightful subjects of legislation," it is clear that Congress intentionally declined to have the Organic Act define the powers of the Attorney General of Guam, and that it instead decided to leave that duty to the Legislature, pursuant to its expansive powers as set forth in 48 U.S.C. § 1423a.

---

[5] Appellee's SER (Sup. Ct. of Guam 7/14/04), at 1, p. 5 (emphasis added).

While the Attorney General's description of the course of the proceedings below in his "Statement of the Case" (Pet. 7-10) was generally accurate, it was incomplete[6] and it mischaracterized portions of the relevant court decisions.

The Guam Supreme Court summarized its holding as follows: "We hold that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute." Pet. App. A-37, ¶ 67. (The Attorney General erroneously used the word "amended" instead of the word "modified" when quoting from the Guam Supreme Court's Opinion. *See* Pet. 10.) The Guam Supreme Court then held that local statutes allowing GIAA to retain independent counsel were "valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act." *Id.*

The Attorney General also mischaracterized the holding of the District Court of Guam in dismissing the Attorney General's Complaint in the closely-related federal case entitled, *Attorney General of Guam v. William R. Thompson*, D. Guam Civ. Case No. CV03-00008, (Order, April 1, 2003) (unpublished). While it is true, as the Attorney General states, that the Complaint was dismissed on *Younger* and *Burford* abstention grounds, the district court also declined to entertain the matter on the "separate and distinct" ground of the Declaratory Judgment Act, 28 U.S.C. § 2201. Resp. App. 4 ("the Declaratory Judgment

---

[6] The Attorney General applied for a stay from the Guam Supreme Court pending disposition of his Petition, but the application for stay was denied on March 2, 2005. Thereafter, this Court, per order of Justice O'Connor, denied a similar application for Stay on March 21, 2005. (Application 04A812.)

Act was not meant for these kinds of actions. Accordingly, the Court grants the motion to dismiss.").

SUMMARY OF ARGUMENT

The case below involved nothing more than a routine question of statutory construction of the kind state and territorial courts address every day. Contrary to the Attorney General's assertion, the courts of Guam did not "exalt[ ] local law over a Congressional enactment."[7] In fact, the Guam courts simply *interpreted* Congressional intent, and thereby reached a result in the case with which the Attorney General is disenchanted. This Court has demonstrated a long-standing "reluctance to review" decisions of territorial courts interpreting federal statutes of peculiarly local concern. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974). Needless to say, the Attorney General's disenchantment provides no justification to abandon this historic reluctance.

On the merits, the critical flaw in the Attorney General's argument is that the vague and undefined term "Chief Legal Officer" as used in the Organic Act does not, on its face, preclude the Guam Legislature from doing anything in particular. Moreover, as we shall see, judicial interpretations of those words from courts around the country confirm that such a designation, even when entrenched in a state constitution, does not preclude state legislatures from authorizing state agencies to employ private counsel. The Guam Supreme Court's disposition was well-reasoned and consistent with the legislative

[7] *See* Pet. 12.

history of the Organic Act as well as similar judicial interpretations on point. It should not be disturbed.

REASONS FOR DENYING THE PETITION

"[A] petition for writ of *certiorari* will be granted only for compelling reasons." Sup. Ct. R. 10. This case is really just an insular squabble between branches of a Territorial government. The Attorney General has failed to come forward with any compelling reason why this Court should grant *certiorari* to address such a squabble, which the Guam courts are fully competent to examine and which has no impact beyond the shores of Guam.

This case does not meet any of the standards for *certiorari*. The Guam Supreme Court's ruling below was consistent with the overwhelming weight of authority from state courts around the country that have addressed similar issues. The Court's Opinion made no new law; it merely made a routine application of these precedents and precedents from this Court. There is no split between the Circuit courts on any important issue of law. Contrary to the Attorney General's assertions, the Guam Supreme Court did not decide an important federal question in a way that conflicts with the decision of another state court or a federal court of appeals. Indeed, the federal statute at issue is uniquely applicable to the Territory of Guam and nowhere else. This Court has demonstrated a long-standing "reluctance to review" decisions of territorial courts interpreting federal statutes of peculiarly local concern. While the Organic Act is a federal statute, it is notable that the Court below also interpreted several unique Guam statutes in rendering its Opinion. Finally,

there is not even a dispute over the meaning of any of this Court's precedents. The Attorney General failed to explain, in light of this Court's standards for granting *certiorari*, why this Court should undertake to review the interpretations given Guam statutes by Guam's highest court.

With this backdrop, GIAA now addresses the four particular "reasons" advanced by the Attorney General which supposedly justify granting its Petition.

I.

THE LACK OF A DECISION FROM AN ARTICLE III COURT FURNISHES NO REASON FOR GRANTING *CERTIORARI*

The Attorney General's first purported reason for granting the petition is, frankly, difficult to fathom. Apparently, the Attorney General is maintaining that this Court should grant *certiorari* simply because the controversy *sub judice* might otherwise escape review of an Article III court. For multiple reasons, this argument is decidedly unpersuasive.

A. Guam Courts are Competent to Address Federal Law

While this Court has held that non-Article III judges may not preside on Circuit court appellate panels, *see Nguyen v. United States*, 539 U.S. 69 (2003), it has neither held nor even suggested that state or territorial judges are prohibited from rendering interpretations of federal statutes. In fact, it is settled law that state and territorial courts are to be *presumed* competent to interpret federal law. *See Moore v. Sims*, 442 U.S. 415, 430 (1979) (noting

that the court has "repeatedly and emphatically rejected" the notion that state courts were not competent to adjudicate federal constitutional claims); *see also Gilbertson v. Albright*, 381 F.3d 965, 983 (9th Cir. 2004) (*en banc*).

B. This Court is Reluctant to Review Territorial Decisions of Local Concern

Not only are non-Article III courts *competent* to pass on federal statutory matters, this Court has demonstrated a long-standing "reluctance to review" decisions of such courts interpreting federal statutes of peculiarly local, territorial concern. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974). In *Pernell*, this court faced the question of whether there was the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property. In addressing the issue, the Court made several observations highly relevant to the instant controversy. In particular, the Court said, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." 416 U.S. at 366-368, *citing, Griffin v. United States*, 336 U.S. 704, 717-718 (1949); *Fisher v. United States,* 328 U.S. 463, 476 (1946); and *Miller v. United States,* 357 U.S. 301, 306 (1958).

In fact, the *Pernell* opinion effectively makes short work out of the Attorney General's Article III arguments by establishing that while this Court certainly has the power to revisit the rulings of territorial high courts, there are sound reasons why it generally declines to do so:

> Congressional Acts directed toward the District, like other federal laws, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute. *See, e.g., O'Brien v. Skinner,* 414 U.S. 524, 531 (1974); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256 (1974). But the new court structure certainly lends additional support to our **long-standing practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'** *Fisher v. United States,* 328 U.S. at 476; *Griffin v. United States,* 336 U.S. at 718.

Id. at 368-369 (emphasis added).

The deference applied in *Pernell* plainly applies to the instant case because the District of Columbia's post-1970 court structure closely resembles that of Guam. Both jurisdictions now have local courts of last resort which are akin to state supreme courts. *See, e.g., id.* at 367. It is notable that the Ninth Circuit Court of Appeals has given similar deference to Guam Supreme Court rulings "on matters of local concern." *See Guam v. Guerrero,* 290 F.3d 1210, 1213-1214 (9th Cir. 2002); *Gutierrez v. Pangelinan,* 276 F.3d 539, 547 (9th Cir. 2002) ("The Congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act.").

Unquestionably, the instant case presents a problem peculiarly (if not exclusively) of local concern; and one without "nationwide application." Moreover, nothing in the Attorney General's Petition even remotely suggests that the instant case presents an "exceptional situation[] where egregious error has been committed" by the Guam courts. Thus, it is respectfully submitted that this court should deny the instant petition on that ground alone.

Moreover, it is elementary that many if not most cases originating in the courts of Guam which raise issues of federal law routinely evade review by an Article III court. If the absence of such Article III court review alone furnished adequate ground for *certiorari*, then this Court would likely have a docket full of cases originating in the courts of Guam and other U.S. territories and possessions where no Article III court sits.[8]

C. This Case Does Not Involve Federal Jurisdictional Issues

The Attorney General suggests that the instant case is somehow akin to *Territory of Guam v. Olsen*, 431 U.S. 195 (1977), in which this Court held that the Guam Legislature was not authorized to divest the local federal court, the District Court of Guam, of appellate jurisdiction in

---

[8] Even if the Attorney General's Article III argument were otherwise colorable, it would not support his contention that *certiorari* should be granted in the instant case. As the Attorney General has conceded, his first attempt to have this controversy heard in federal court was rejected by dismissal of the case *Attorney General of Guam v. Thompson*, District Court of Guam Civil Case No. CV03-00008. The Attorney General's appeal of that dismissal was recently heard by the Ninth Circuit, which is indisputably an Article III court.

cases turning on questions of federal law. However, the instant case implicates no such attempt to deprive the District Court of any jurisdiction. This is simply an intragovernmental dispute concerning the right of a Government of Guam agency to hire private counsel, a matter of local concern of no impact on the federal judiciary.

D. The "Article III" Issue was Not Pressed or Passed Upon Below

Finally, the supposed issue of evading Article III review is not properly before the Court because it was not pressed or passed upon in the Courts below, but is being raised now for the first time. Earlier this term, the Court observed that, " . . . this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858 (2005), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). *Certiorari* should not be granted where the state supreme court did not expressly address the question for which *certiorari* is sought and the petitioner does not meet its burden of showing that the issue was properly presented to that court. *See Adams*, 520 U.S. at 86. The Attorney General simply never argued any Article III issue until now and the Guam courts had no occasion to analyze it.

II.

THE SUPREME COURT OF GUAM'S OPINION DOES NOT DEVIATE FROM THIS COURT'S PRECEDENTS

The Attorney General maintains that the Guam Supreme Court's holding in the case below is somehow in conflict with this Court's jurisprudence interpreting Guam's Organic Act. Yet the Attorney General never quite gets around to pointing out any particular holding of the case below that is directly contrary to any of this Court's pronouncements. Instead, he merely argues that the Guam Supreme Court's *reasoning* was different than that employed by this Court in analogous cases. That is not surprising, because the statutes and issues involved in the instant case are entirely distinct from those addressed by this Court in those earlier cases.

First, the Guam Supreme Court did not make any rulings contrary to the *Olsen* case because, as discussed above, the issues in the instant case have no similarity to those presented in *Olsen*. This case does not involve any attempt by the Guam Legislature to deprive the District Court of jurisdiction; and it involves entirely different Congressional and Legislative enactments than those addressed in *Olsen*. Nothing in *Olsen* even remotely addresses the issue of whether the Guam Legislature can permit Guam agencies to retain private counsel despite the Attorney General's "Chief Legal Officer" designation.

Likewise, *Chase Manhattan Bank (N.A.) v. South Acres Dev. Co.*, 434 U.S. 236 (1978) (*per curiam*), was concerned with the scope of federal jurisdiction granted to the District Court of Guam under the Organic Act. Yet

South Acres is even further afield of the current controversy because the case did not in any manner involve any alleged conflict between local and federal enactments. *South Acres* merely stands for the proposition that "[w]here . . . Congress has clearly established appropriate limitation on the District Court's original jurisdiction, [courts] are compelled to respect those limits." *Id.* at 240 (holding that the Organic Act did not vest the District Court of Guam with diversity jurisdiction). By contrast, the mere designation of the Attorney General as "Chief Legal Officer" does not "clearly establish[ ]" anything.

Finally, *Gutierrez v. Ada*, 528 U.S. 250 (2000), is similarly wide of the mark. *Gutierrez* involved no allegedly-conflicting local enactments but merely interpreted the term "votes cast" as used in an Organic Act provision pertaining to elections for Governor. *Id.* at 255. Ironically, to the extent *Gutierrez* has any relevance whatsoever to the present dispute, it aids GIAA, not the Attorney General. The *Gutierrez* court's discussion about avoiding "the giving of unintended breadth to Acts of Congress" (*Id.*[9]) certainly has salience with respect to Congress' use of the unadorned phrase "Chief Legal Officer."

III.

THE SUPREME COURT OF GUAM'S OPINION DOES NOT CONFLICT WITH NINTH CIRCUIT RULINGS

The Attorney General also maintains that the Guam Supreme Court's disposition conflicts with relevant Ninth

---

[9] *Quoting Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), with reference to the venerable doctrine of *noscitur a sociis*.

Circuit authority on point. In particular, the Attorney General discusses the cases of *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989); but again, the Attorney General fails to identify any particular holding of the case below that is irreconcilable with prior case law. Indeed, these two Ninth Circuit cases are plainly and fundamentally distinguishable from the scenario presented in the case at bar.

In the *Bordallo* case, the issue was whether the Governor or the Legislature had the authority to appoint members to the Guam Memorial Hospital governing body. The Ninth Circuit held that the Governor had that authority because the Organic Act *specifically* vested his office with such authority and that the Legislature therefore could not, by subsequent legislation, divest the Governor of such power. Significantly, the *Bordallo* court observed that the Organic Act vested the Governor with "general supervision and control of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the government of Guam." *Id.* at 934, *citing* 48 U.S.C. § 1423a. The court then noted that such supervisory authority specifically included "the power to appoint and remove officers and employees of the executive branch." *Id.* Finally, the Court observed that the Governor was "specifically charged" by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining and operating hospitals. *Id.*

Similarly, in *Nelson*, the Ninth Circuit expressly relied upon its earlier ruling in *Bordallo* in holding that where the Organic Act specifically charged the Governor with the responsibility for establishing and maintaining the public education system school board members had to be appointed by the Governor. 878 F.2d at 278-279. As in

Bordallo, the *Nelson* court found that the Legislature could not contravene specific Organic Act provisions indicating that the Governor was empowered to make such appointments. *Id.* at 279.

In contrast to these two cases, no such similar "specific," empowering Organic Act language applies to the instant controversy. The Organic Act provision describing the Attorney General's powers is comparatively vague and distinctly *un*specific in this regard: It states only that the Attorney General is the "Chief Legal Officer" of the Government. Indeed, while the Governor's duties are set forth in the Organic Act, the Attorney General's duties are found not in the Organic Act but in a provision of *local* law, namely 5 G.C.A. § 30109, which provides that the Attorney General shall "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; **provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.**" 5 G.C.A. § 30109(c) (emphasis added).

The Opinion in the case below does not in any manner conflict with these two Ninth Circuit cases because while the Organic Act grants the Governor of Guam specific powers that cannot be infringed upon, the Attorney General was granted no such specific powers. He is merely the "Chief Legal Officer" of the Government of Guam. As we shall see in the following section of this brief, courts around the country that have interpreted that phrase have concluded that it is not inconsistent with allowing agencies the right to retain private counsel.

IV.

THE SUPREME COURT OF GUAM DID NOT ERR IN FINDING THAT THE ORGANIC ACT PERMITS THE GUAM LEGISLATURE TO LIMIT THE POWERS OF THE ATTORNEY GENERAL

As the Rules of this Court make plain, "[a] petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a correctly-stated rule of law." Sup. Ct. R. 10. Nowhere in his Petition does the Attorney General maintain that the Guam Supreme Court misstated the applicable law. Instead, he merely argues that the court *misapplied* the law and reached the wrong conclusion. Thus, the Attorney General's extended argument to the effect that Guam Supreme Court misapplied familiar rules of statutory construction does little to advance his Petition. Nevertheless, GIAA now undertakes to respond to the Attorney General's argument.

The Guam Legislature has expressly invested in certain autonomous government agencies, such as GIAA, the power to sue and be sued and to retain independent counsel. This arrangement is prevalent in the United States and has been an historical practice in Guam for decades. The Attorney General now argues that the 1998 amendment to Guam's Organic Act has stripped the Guam Legislature of its power to authorize autonomous government agencies to retain independent counsel. The 1998 amendment, however, did not expressly deprive Guam's Legislature of this right. Moreover, it is a "cardinal principle" of construction that repeals by implication are not favored. *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-155 (1976) ("It is not enough to show that the two statutes

produce differing results . . . '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and then only to the minimum extent necessary.'"); *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In fact, as discussed above, prior to the enactment of this legislation, Congress was advised in writing by the Guam Compiler of Laws that the proposed amendment "did not" eliminate "the use of outside counsel for various agencies . . . " *See* p. 4, *supra*. Moreover, state courts have repeatedly held that legislatures may permit government agencies to retain independent counsel, notwithstanding the constitutional designation of an elected Attorney General as a "Chief Legal Officer."

A. The Powers of a Constitutionally-Elected Attorney General May be Limited by Legislatures.

Courts throughout the United States have consistently held that the powers of constitutionally-elected Attorneys General may be limited by legislative enactment. *Johnson v. Commonwealth, et al.*, 165 S.W. 2d 820, 826 (Ky. 1942) ("The Legislature may not only add duties but may lessen or limit common law duties."); *see also State of Missouri ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W. 2d 857, 861 (Mo. 1943) ("On the first question, there can be no doubt that the Constitution does not prohibit the General Assembly from limiting the common law powers of the Attorney General."); and *State of North Dakota v. Erickson*, 7 N.W.2d 865, 868 (N.D. 1943) ("The attorney general is a constitutional officer only in so far as the establishment of the office is concerned . . . Authority that the legislature may at one time prescribe, it

may later take away and vest elsewhere. I have no doubt that the legislature by express restriction may curtail powers normally exercised by the attorney general by vesting such powers as it may see fit in other officials or such attorneys as it may specifically authorize to act.").

The fact that an Attorney General's position is authorized by a state constitution does not prohibit a legislature from prescribing his duties. *Shute v. Frohmiller*, 90 P. 2d 998, 1003 (Ariz. 1939) ("[We] are clearly of the view that the mere naming of the attorney general in the constitution of this state does not amount to an implied restriction on the authority of the legislature in prescribing his duties."), *overruled on other grounds* by *Hudson v. Kelly*, 263 P.2d 362, 366-67 (Ariz. 1953) (legislature has "implied mandate" to grant Attorney General powers and duties to perform functions of office).

B. A Legislature May Permit Government Agencies to Retain Independent Counsel.

In *Hansen v. Utah State Retirement Board*, 652 P. 2d 1332 (Utah 1982), the Utah Attorney General argued that he was constitutionally authorized to act as "legal adviser" to "state officers," and, as a consequence, state governmental agencies (such as the Utah State Retirement Board, Utah State Insurance Fund and the University of Utah) were prohibited from retaining independent counsel. The Utah Supreme Court was unpersuaded: "As to each defendant, the Legislature has conferred specific statutory authority authorizing the employment of independent counsel . . . Thus, the authority for each defendant to hire independent counsel has a clear statutory foundation." *Id.* at 1340. *See also, Board of Public Utility Commissioners of*

New Jersey v. Lehigh Valley, 149 A. 263, 264 (N.J. 1930) (powers and privileges of the Attorney General as they existed at common law, and particularly as conferred by statute, are subject to change and modification by legislative enactment); *People v. Santa Clara Lumber Co.*, 110 N.Y.S. 280, 281 (N.Y. 1908) ("The Attorney General is a constitutional officer, but his principal duties are from time to time defined by statute. We cannot agree with him that he alone is authorized to represent the state as attorney in bringing actions in the name of the people of the state."); *State Compensation Insurance Fund v. Riley*, 69 P.2d 985, 987 (Cal. 1937) ("[t]he law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provision. . . . ")

Guam's Legislature, like the legislatures of most states, has expressly empowered certain government agencies, such as GIAA, to retain independent counsel. *See* 12 G.C.A. §§ 1108(a), (d).[10] Under Guam law, "those branches, department or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General." 5 G.C.A. § 30109(c) (emphasis added).

---

[10] By statute, the Attorney General of Guam must approve any contract for legal services. 5 G.C.A. § 5121(b). However, the Attorney General is only permitted to participate in the negotiations for such a contract "upon the request of the government officer or agency primarily responsible for such negotiations." 5 G.C.A. § 5121(b). Furthermore, the right of the Attorney General to review professional services agreements is limited to an inquiry as to "correctness of their form" and "legality" in order to confirm that the "required procedures" were followed to award the contract. 2 G.A.R. § 2113; 5 G.C.A. § 5150.

Bolstering this plain language is the Comment of the Compiler of Laws in the Guam Code Annotated which observes: "Subsection (c) has been amended by P.L. 18-04:5, to conform to the laws which give to specific agencies the authority to hire their own lawyers, who may undertake litigation without the supervision of the Attorney General. Such agencies include ... the Airport Authority ..." *See* 5 G.C.A. § 30109, *Comment.*

C. The Designation of the Attorney General as "Chief Legal Officer" Does Not Prohibit Guam's Legislature from Allowing Autonomous Agencies to Retain Independent Counsel.

A thread woven throughout the Attorney General's Petition is the argument that Congress considered but rejected a proposal to make the Attorney General's powers subject to the clause "as may be prescribed under the laws of Guam."[11] However, this argument about what *might have been* stated in the Organic Act lends the Attorney General little aid. In fact, the argument cuts both ways. For while it is true that Congress did not adopt the suggested language in connection with the phrase "Chief Legal Officer," it is equally true that Congress failed to adopt specific and expansive language, which Congress applied to the office of Governor, that would have vested the Attorney General with "general [legal] control and supervision of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the Government of Guam." *See* 48 U.S.C. § 1422. If Congress

[11] The Attorney General points to the Organic Act provisions setting forth the duties of the office of the Lieutenant Governor and notes that Congress "expressly authorize[d] the local legislature to prescribe [his] powers and duties." Pet. 15.

had adopted such language with respect to the office of the Attorney General, then the Guam Supreme Court would surely have agreed with him that his office had the power to preclude or control private counsel. *See, e.g., In re: Request of Governor Camacho, rel. to the Interpretation and Application of Sections 6 and 9 of the Organic Act*, 2004 Guam 10 at ¶ 38, 2004 WL 1293239 ("We thus conclude that the Governor's power of 'general supervision and control of all departments, bureaus, agencies and other instrumentalities of the executive branch of the government of Guam,' means that the Governor is vested with the overall power to manage, direct, or oversee such entities."). However, Congress did *not* adopt such language with respect to the Attorney General. To paraphrase the Attorney General's Petition, "Congress knew full well" how to invest expansive supervisory powers in Organic Act officers. *See* Pet. 29. Yet Congress declined to do so in the case of the Attorney General's office.

Instead of using the specific and expansive language applicable to the office of Governor, Congress was content with the unadorned phrase, "Chief Legal Officer of the Government." The courts of the various states have made it plain that these simple words are not to be given the sweeping application the Attorney General claims. For example, in *Woodahl v. State Highway Commission*, 465 P. 2d 818 (Mont. 1970), the Attorney General of Montana argued that he was the "chief legal officer" of his state, and that the State Highway Commission should not be permitted to retain independent counsel. The Montana Supreme Court rejected that notion and resolved the dispute as follows:

> However, he [the Attorney General] is not omnipotent, or as one brief put it, does not have

> "dictatorial power." However broad the power of the Attorney General, it is not exclusive. That is to say, the question of whether he can hire, fire, and direct all legal representation of state officers or agencies, especially of the highway commission, depends here, upon whether the legislature has authorized the highway commission to do as it has done.

Id. at 820.

In *State of Oklahoma v. Georgia-Pacific Corp.*, 663 P.2d 718, 722-723 (Okla. 1982), the Attorney General of Oklahoma argued that because he was elected and designated "Chief Law Officer," he had the common law authority to file actions without the approval of the Governor or the Legislature notwithstanding a statute requiring that he get approval before doing so. The Supreme Court of Oklahoma disagreed and ruled: "We fail to see that the legislative investiture of the mantle of 'Chief Law Officer' alone conferred upon the office a stature which it did not already have. . . . "

Like Guam, Florida's Attorney General is the "chief state legal officer." *State of Florida ex rel. Shevin v. Yarborough*, 257 So.2d 891, 893 (Fla. 1972). Despite this fact, Florida's Supreme Court has repeatedly allowed state agencies to retain private counsel when they had legislative authority to do so. *Watson v. Caldwell*, 27 So.2d 524 (Fla. 1946); *Holland v. Watson*, 14 So.2d 200 (Fla. 1943).

D. Guam Law has Not been Preempted by Federal Law.

1. Federal preemption requires a "clear and manifest" intention of Congress.

Although he no longer speaks in terms of "preemption," the crux of the Attorney General's argument is that the 1998 amendment to the Organic Act effectively preempted any local statutes in Guam allowing autonomous agencies to be represented by independent counsel. In passing on questions of preemption, this Court starts with the assumption that the powers of the states are not to be superseded by federal law "unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("when considering preemption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also*, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

This Court has held that federal law preempts local law only in three limited situations: (1) where Congress "explicitly" defines the extent to which it is preempting state law; (2) where, absent "explicit statutory language," the federal scheme is so pervasive as to leave "no room for the States to supplement it;" and (3) where there is such an actual conflict that it is impossible to comply with both federal and state requirements. *See*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *English v. Gen. Elect. Co.*, 496 U.S. 72, 78-79 (1990); *see also*, SINGER, SUTHERLAND STAT. CONSTR., § 23.21 (2002 ed.) (conflict must be irreconcilable).

Federal preemption is not automatic just because Congress enacts legislation in a field of law. *See New York State Department of Social Services v. Dublino*, 413 U.S. 405, 422 (1973) (recognizing the validity of a New York law conditioning an individual's receipt of federal Aid to Families with Dependant Children assistance upon fulfillment of additional state requirements). Indeed, this Court's jurisprudence recognizes a presumption favoring the legitimacy of state legislation as opposed to federal preemption. *Id.* The Court has stated: "If Congress is authorized to act in a field, it should manifest its intention clearly . . . The exercise of federal supremacy is not lightly to be presumed." *Id.* at 413 (*quoting Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

Accordingly, the Court presumes that Congress does *not* intend to preempt state legislation unless there is a clear indication from the language or purposes of the federal statute or regulation. *Id.* "Mere silence," the Court has held, "cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 440 (2002) (*quoting Mortier*, 501 U.S. at 607). Moreover, if joint compliance is possible and the state and federal purposes are similar or identical, the state action is deemed supplementary to the federal purposes and the regulation must be sustained. *See generally Mortier*, 501 U.S. at 607 (federal law implies regulatory partnership between federal, state and local governments); *see also*, SINGER, SUTHERLAND STAT. CONSTR., § 23.22 (2002 ed.).

2. The express language of the Organic Act does not prohibit Guam's Legislature from allowing autonomous agencies to retain independent counsel.

Inasmuch as the Organic Act is silent on the subject of independent counsel representing government agencies, it cannot plausibly be argued that the federal scheme is so pervasive in the area as to leave "no room for the states to supplement it." Additionally, there is no actual conflict between the Organic Act and Guam law such that it is impossible to comply with both federal and state requirements. The fact that Guam has specific legislation authorizing GIAA to retain independent counsel is an important consideration when resolving any issue of statutory construction. *See* SINGER, SUTHERLAND STAT. CONSTR., § 5105 at 244-257 ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.")

Indeed, there is nothing at all in the plain language of the 1998 Amendments to the Organic Act that suggests that the powers of the Guam Legislature were being curtailed in relation to an elected Attorney General.[12] The

[12] If anything, Guam's Legislature undoubtedly has more power over Guam's elected Attorney General than other state legislatures have over their own elected Attorneys General. Unlike many states, the existence of an elected Attorney General in Guam is not a matter of constitutional right. Congress expressly provided by legislative enactment that the Guam Legislature could decide whether Guam should or should not have an elected Attorney General. 48 U.S.C.

(Continued on following page)

mere identification of the Attorney General as the "Chief Legal Officer of the Government of Guam" does not mean that his powers extend to distinct and independent government agencies. Indeed, as observed above, if Congress had intended the Attorney General to have plenary control over legal affairs of all government agencies it could easily have advanced such an intention by cloning the Organic Act language describing the duties of the Governor. *See* 48 U.S.C. § 1422 (vesting Governor with "general control and supervision of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the Government of Guam."). Congress, however, did not do so.

Moreover, even judicial authorities interpreting more specific language have expressly held that the Attorney General's powers do not extend to distinct agencies of the government. For example, in *Saint v. Allen*, 134 So. 246 (La. 1931), the Attorney General of Louisiana argued, much as Guam's Attorney General now maintains, that any statute authorizing the retention of independent counsel was in conflict with the state Constitution.[13] The Supreme Court of Louisiana in *Saint* rejected such a view, holding that the Constitution only authorized the Attorney

---

§ 1421g(2), as amended by Public Law 105-291 Section 2. In addition, Congress has allowed Guam's Legislature to decide upon the "procedures" by which Guam's elected Attorney General could be removed "for cause." *Id.* It is difficult to imagine any state legislature in the United States having greater powers over an elected Attorney General.

[13] The Louisiana constitutional provision at issue was far more specific and empowering than the term "Chief Legal Officer." It provided, *inter alia*, that the Attorney General "shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings . . ." *Id.*, 134 So. at 247.

General to represent the "State;" and that the Highway Commission was a distinct "agency of the State," with the power to sue or be sued, and "not the State itself." *Id.* at 249. For this reason, the Court found that the "duties and powers of the Attorney General and his assistants do not, by virtue of the Constitution, save as some of those duties may be prescribed by statute, attach to the commission." *Id.*

Based upon the foregoing analysis and authorities, it is clear beyond peradventure that the Guam Supreme Court's disposition is sound and in harmony with the great weight of authority on point. The court below neither misstated nor misapplied the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner's petition should be denied.

Dated this 1st day of June, 2005.

Respectfully submitted,

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

**Counsel of Record for Respondent*

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

THE ATTORNEY GENERAL OF GUAM, Plaintiff, vs. WILLIAM R. THOMPSON, in his official capacity as Executive Manager of the Guam Airport Authority, Defendant.	Civil Case No. 03-00008 ORDER (Filed Apr. 1, 2003)

This case came before the Court on March 26, 2003 for hearing on three motions filed by the defendant. The defendant sought dismissal of the case on three grounds: (1) plaintiff's failure to name the proper defendant and join an indispensable party; (2) lack of subject matter jurisdiction; and (3) unsuitability of declaratory relief. Assistant Attorney General J. Basil O'Mallan appeared on behalf of the plaintiff, the Attorney General of Guam. Appearing on behalf of the defendant William R. Thompson ("Mr. Thompson") was Attorney David Mair. At the conclusion of the hearing, the Court ruled on the pending motions. The Court now issues this written Order memorializing its oral ruling.

FACTS and PROCEDURAL HISTORY

The facts are basically undisputed. Mr. Thompson is the Executive Manager of the Guam International Airport Authority ("GIAA"). On March 3, 2003, the plaintiff

brought suit in this Court against the defendant. Pursuant to the federal Declaratory Judgement Act, 28 U.S.C. § 2201,[1] the plaintiff prayed that the Court would "[e]nter a declaratory judgment ... wherein the rights of the parties ... are determined, and specifically, [p]laintiff prays that this Court enter a Judgment providing that the designation of Chief Legal Officer in 48 U.S.C. § 1421g(d)[2] pre-empts any laws of Guam respecting the distribution of power and responsibilities between the Attorney General of Guam and private counsel representing government agencies and department." *Complaint* at 4, ¶1. The plaintiff also sought temporary and permanent injunctions enjoining the defendant "and those in active concert or participation with him ... from entering into a contract with an attorney to provide legal services for [GIAA] that is berett [sic] of provisions for supervision by the [p]laintiff of any litigation conducted by such attorney on behalf of [GIAA]." *Complaint* at 4, ¶3.

On March 5, 2003, the plaintiff moved for the issuance of a preliminary injunction.

---

[1] This statute in pertinent part provides:

> "In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201 (emphasis added).

[2] The pertinent provision of the Organic Act of Guam states: "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

On March 7, 2003, GIAA filed a Petition for Writ of Mandamus in the Superior Court of Guam.[3] The Superior Court action involves identical issues to those raised in this case. In the Superior Court action, the parties seek judicial interpretation of local law as well as the Organic Act in order to resolve the dispute over authority to retain and be represented by private counsel. Presiding Judge Alberto C. Lamorena, III issued an Alternative Writ of Mandate ("Writ") in the Superior Court action directing the Attorney General to allow GIAA to retain independent counsel of its choice or show cause why he has not done so on March 28, 2003. The Writ also set a briefing schedule for the filing of any opposition and reply concerning the issuance of the Writ.

On March 10, 2003, the defendant filed the three motions at issue here.[4] Because the motions challenged the Court's jurisdiction over the case, the Court expedited the briefing schedule and held the plaintiff's motion for preliminary injunction in abeyance until the jurisdictional issues were resolved.

On March 17, 2003, the plaintiff filed opposition briefs to the three motions to dismiss. On March 20, 2003, the defendant filed his reply briefs.

---

[3] *A.B. Won Pat Guam International Airport Authority v. Moylan*, Special Proceedings Case No. SP0055-03 ("Superior Court action").

[4] The defendant also filed a fourth motion – an *Ex Parte* Motion to Redact and Seal Confidential Communications – which this Court granted on March 11, 2003.

ANALYSIS

The defendant's three motions raise separate and distinct issues, which the Court will address separately below.

I. Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party

The defendant requested this Court to dismiss the Complaint against Mr. Thompson on the basis that the plaintiff had failed to name as a party to this action the Board of GIAA, which is charged with the execution of the statutory right to appoint legal counsel other than the Attorney General. The defendant contends that the Board of GIAA is clearly the proper party defendant, not Mr. Thompson, who does not have the statutory authority to appoint an independent attorney.

Pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, the court may dismiss a claim for "failure to join a party under Rule 19." Rule 19, in turn, provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the

> claimed interest. If the person has not been so joined, the court **shall order** that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined Party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action. Fed. R. Civ. P. 19(a) (emphasis added).

As noted, the defendant maintains that this action cannot proceed without naming GIAA as a defendant because it is GIAA through its Board that has the statutory right to appoint independent legal counsel. *See Memorandum of Points and Authorities in Support of Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party* at 11. The Court concurs that GIAA is an indispensable party and, pursuant to Fed. R. Civ. P. 19(a), should be ordered to be made a party to this suit.

The plaintiff's opposition to this motion is, as the defendant describes, "largely irrelevant." *See Reply in Support of Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party* at 9. The plaintiff's opposition brief attempts to argue that the GIAA attorney is actually an "unclassified employee" of the Government of Guam subject to the personnel laws. Thus, the plaintiff alleges that the Executive Manager of GIAA has the authority to select said attorney. The plaintiff's opposition brief misses the point. What the defendant and the GIAA Board were attempting to do was enter into a contract for legal services, not hire in-house counsel who would be an unclassified employee. Thus, the personnel laws have no role in this dispute.

The plaintiff's failure to join an indispensable party is not fatal to this action since Rules 19(a) and 15(a) of the Federal Rules of Civil Procedure and the liberal policy behind them permit amendments to a party's pleading. Accordingly, the Court DENIES the motion to dismiss and permits the plaintiff to amend the Complaint to join the GIAA Board.[5]

II. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The defendant's second motion discusses two main grounds for dismissal. First, the defendant argues that the case should be dismissed because of a lack of federal question over the cause of action. Second, if the Court determines that a federal question is presented, the defendant contends that dismissal is warranted based upon the doctrine of federal abstention. These arguments are discussed in greater detail below.

A. Existence of a Federal Question

The defendant asserts that similar to the case of *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002), this case does not raise a federal question, and thus dismissal is warranted. A quick review of the holding in the *Republican Party* case is helpful.

In the *Republican Party* case, the Ninth Circuit discussed the basic concepts of federal question jurisdiction. "The district courts shall have original jurisdiction of

[5] Amendment of the Complaint is not necessary in light of the Court's ruling *infra*.

all civil actions *arising under* the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis added). Furthermore, a case "arises under" federal law either (1) where federal law "creates the cause of action," or (2) "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8-9, 103 S. Ct. 2841, 2846 (1983) (citations omitted). The Ninth Circuit went on to state:

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is present on the face of the plaintiff's properly pleaded complaint. . . . The well-pleaded complaint rule applies to declaratory judgment cases such as the present one. *Republican Party,* 277 F.3d at 1089.

Thus, the Court must begin its analysis by examining the Complaint and scrutinizing the relief plaintiff seeks. In the present case, the face of the Complaint alleges that jurisdiction arises under 48 U.S.C. § 1421g(d) of the Organic Act, which functions as Guam's constitution. As noted previously, the Organic Act states that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1). The complaint further asserts that a controversy exists under the Organic Act because GIAA, in its attempt to enter into a contract with a private attorney to provide it with legal services, is hindering the plaintiff's authority as the "Chief Legal Officer of the Government of Guam" to supervise litigation conducted by private counsel representing agencies and departments of the Government of Guam. The plaintiff thus asks this Court to declare that

the designation of Chief Legal Officer under the Organic Act preempts any local law which authorizes autonomous agencies to hire their own lawyers and litigate independently of the Attorney General.

The defendant contends that this type of declaratory action cannot support federal question jurisdiction. The defendant states that "what the Attorney General is asking for in the present case is only a slight variation from what the Guam Legislature asked of this Court in *Republican Party*." *Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 9.

The defendant's reliance on *Republican Party,* however, is unavailing. In the *Republican Party* case, the plaintiff sought to enforce a local statute which required the Governor to choose at least three of Guam's Election Commission members from a list supplied by the Republican Party. The plaintiff there asserted that the Governor was not fulfilling his Organic Act duty to faithfully execute the laws of Guam. In defense, the then-Governor raised an Organic Act issue. The Ninth Circuit reversed on the basis that raising an Organic Act defense cannot confer federal question jurisdiction.

The plaintiff contends that this is not merely an "intra-governmental power struggle." Instead, this lawsuit seeks to enjoin an action by a government official on the basis that the action does not comply with federal law, specifically since the Organic Act dictates that the Attorney General shall be the "Chief Legal Officer of the Government of Guam." Thus, plaintiff contends that unlike the *Republican Party* case, this case is not merely an "intra-governmental power struggle." Rather, this action

involves a legal interpretation of the Organic Act, a federal law.

The Court concurs with the plaintiff. As stated by the Supreme Court in *Franchise Tax Bd.* and by the Ninth Circuit in *Republican Party,* here the vindication of a right under local law necessarily turns on construction of the Organic Act – a federal law. The Attorney General of Guam must seek to restrain an action of a local official relying on his authority created by local law which allegedly conflicts with the authority provided to the Attorney General under the Organic Act. Accordingly, this Court has subject matter jurisdiction over this action as it arises under a federal law. *See also United States v. Morros,* 268 F.3d 695 (9th Cir. 2001) (suit for declaratory and injunctive relief to determine whether Nuclear Waste Policy Act preempted state law under the Supremacy Clause arose under federal law, thus conferring jurisdiction upon federal court).

Equally unavailing is the defendant's reliance on the case of *Gutierrez v. Pangelinan,* 276 F.3d 539 (9th Cir. 2002) ("*Pangelinan*").[6] The defendant relies upon *Pangelinan,* to support his proposition that the Court has no federal jurisdiction over actions such as this which arise under the Organic Act. Specifically, the defendant relies on dicta in the *Pangelinan* case wherein the Ninth Circuit, in

[6] This case started out as an action in the Superior Court of Guam seeking a declaration that a bill passed by the Guam Legislature was not duly enacted. The Superior Court entered judgment for the defendants, which was reversed by the Guam Supreme Court on appeal. The defendants petitioned the Ninth Circuit for review. The Ninth Circuit granted the petition and affirmed the decision of the Guam Supreme Court.

determining what standard of review to apply, stated: "the congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act." *Pangelinan*, 276 F.3d at 547. The defendant asserts that if this Court exercises jurisdiction over this matter, there is no meaningful way for the Guam Supreme Court to exercise its role in "shaping the interpretation and application of the Organic Act." The *Pangelinan* case, however, does not address federal subject matter jurisdiction. Thus, it is irrelevant to the present inquiry.

B. The Abstention Doctrines

Having found that this Court has subject matter jurisdiction over the action, the next issue is whether the Court will decline to proceed though it has jurisdiction. The courts have recognized various abstention doctrines. The parties have only discussed the doctrine of abstention established in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 760 (1971), but the Court will also analyze the *Burford*-type abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943).[7]

The doctrine of abstention established in *Younger* requires that a federal court not interfere with an ongoing state judicial proceeding that implicates important state interests where there is an adequate opportunity to raise

---

[7] While the parties do not specifically invoke the *Burford* doctrine, the parties do discuss whether this Court or the Guam Supreme Court has jurisdiction over matters relating to the professional conduct of attorneys. *See* discussion *infra*.

federal claims in the state proceeding. In *Younger,* the Supreme Court adopted a strong federal policy against federal court interference with pending state judicial proceedings. *See H.C. v. Koppel,* 203 F.3d 610, 613 (9th Cir. 2000). "Younger and [its progeny] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a State tribunal." *Ohio Bureau of Employment Serv. v. Hodory,* 431 U.S. 471, 479, 97 S. Ct. 1898, 1903 (1977). "Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." *Koppel,* 203 F.3d at 613 (quoting *The San Remo Hotel v. City & County of San Francisco,* 145 F.3d 1095, 1103 (9th Cir. 1998). If the *Younger* doctrine applies, the case must be dismissed. *Koppel*, 203 F.3d at 613.

In this case, the defendant asserts that all three requirements are met, and the Court agrees. First, there is an ongoing action in the Superior Court which presents identical issues to those raised in the instant case. The defendant asserts that the Superior Court action has progressed further than the action in this Court since the Writ in that case commanded the Attorney General to perform his statutory duties and permit GIAA to retain independent counsel of its choice as allowed under Guam law or show cause on March 28, 2003 why he has not done so. Second, there is no doubt that the proceedings in both the local and federal court implicate important local issues, that is the scope and powers of the Attorney General, the Legislature and the autonomous government agencies, and the Attorney General's responsibility to

establish legal policy for the Government of Guam. Third, the Superior Court action, which, as previously noted, raises identical issues to those present in this suit, provides the plaintiff with an adequate opportunity to litigate the Organic Act claims.

The plaintiff, on the other hand, argues that *Younger* abstention is not warranted in situations such as this where the federal action was filed before an identical state action is brought. The plaintiff asserts that "for the simple reason that unfortunately for [d]efendant, there was no 'pending' or 'ongoing' state proceeding, the doctrine of abstention cannot apply." *Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Defendant's Motion to Dismiss Based on Unsuitability of Declaratory Relief* at 11.

However, as the defendant notes in its reply brief, the test is not who made it first to the courthouse but whether "any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S. Ct. 2281, 2292 (1975). In this case, while the Court has decided to address three motions involving procedural and jurisdictional issues, the Court has not addressed the *merits* of the action. The Superior Court of Guam, on the other hand, has progressed further in the local action. Additionally, on March 14, 2003, Judge Joaquin V.E. Manibusan, Jr. denied the Attorney General's request for a stay of the Superior Court action pending the outcome these motions. The Superior Court of Guam has indicated its intentions to swiftly address the merits of this dispute. Since all three criteria have been met, the Court must accordingly dismiss this case under *Younger*.

Additionally, under the *Burford* doctrine, where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of the state court. In *Burford* an oil company filed suit in federal court to attack the validity of a permit that the Texas Railroad Commission had granted. The Supreme Court held that although the federal court had diversity jurisdiction, it properly declined to rule on the merits since "the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide." *Burford,* 319 U.S. at 327, 63 S. Ct. at 1104.

"*Burford* allows federal courts to 'decline to rule on an essentially local issue arising out of a complicated state regulatory scheme.'" *Morros,* 268 F.3d at 705 (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n,* 676 F.2d 374 (9th Cir. 1982)). Since it decided *Burford*, the Supreme Court has not provided a formulaic test for determining when dismissal under *Burford* is appropriate, although it has made it clear that the *Burford* abstention doctrine is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a Controversy properly before it." *Ouakenbush v. Allstate Ins. Co.,* 517 U.S. 706, 727-28 (1996) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976)). The Ninth Circuit, however, does require the presence of certain factors before a district court can abstain under *Burford.* The application of the *Burford* abstention doctrine requires:

> first that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that the federal issues could not be separated easily from

> complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy. *Morros*, 268 F.3d at 705.

This case presents more than just an interpretation of a provision in the Organic Act of Guam. Rather, it involves complex local issues surrounding the professional conduct of attorneys. Whether the Attorney General can represent GIAA in all legal matters unrelated to this action requires interpretation and analysis of the Guam Rules of Professional Conduct relating to conflicts of interest. Can the Attorney General sue his own client (GIAA)? Does the Attorney General have a conflict of interest now that it has sued GIAA which prevents the Attorney General from representing GIAA in matters unrelated to this suit? Can the Attorney General concurrently represent two Government of Guam agencies in a legal dispute? These questions have been raised in the pleadings. The Guam Supreme Court and the Guam Bar Ethics Committee have jurisdiction over these matters, not this Court. The Supreme Court has ruled that the federal courts should abstain from interfering with the states' traditional exercise and control over the professional conduct of attorneys under their own statutes. *See Middlesex County Ethics Comm. v. Garden*, 457 U.S. 434-35, 102 S. Ct. 2515, 2522-23 (1982). Here, the local laws clearly give the Guam Supreme Court jurisdiction over the professional conduct and discipline of members of the Guam Bar. Additionally, the complex local issues surrounding attorney conduct cannot be easily separated from the federal question arising under the Organic Act. This Court cannot decide the federal question without implicating or infringing upon ethical matters reserved for the Guam Supreme Court. A decision by this

Court on the matter will also impede Guam's efforts to establish a coherent policy with regard to the standards for regulating attorney conduct. Accordingly, the Court dismisses this case under the *Burford* abstention doctrine as well as the *Younger* abstention doctrine. As the Supreme Court cautioned, "[d]elay, misunderstanding of local law, and needless federal conflict with the [s]tate policy, are the inevitable product of this double system of review." *Burford,* 319 U.S. at 327, 63 S. Ct. at 1104.

III. Motion to Dismiss for Unsuitability of Declaratory Relief

The last motion before the Court is a Motion to Dismiss for Unsuitability of Declaratory Relief. The Court has already dismissed this action by granting the defendant's second motion, *see supra,* however, in the interest of completely disposing of the three motions on their merits, the Court will discuss the arguments raised in the third motion.

The instant motion addresses the Court's discretion to dismiss pursuant to the Declaratory Judgment Act. The defendant asserts that even if there were a federal question and even if *Younger* abstention were not mandatory, the Court should nonetheless exercise its discretion to dismiss.

The pertinent portion of the Declaratory Judgment Act is quoted in footnote 1 *supra.* Jurisdiction under the Declaratory Judgment Act is discretionary for it is "deliberately cast in terms of permissive, rather than mandatory, authority." *Public Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 250, 73 S. Ct. 236, 243-44 (1952) (J. Reed, concurring). The Declaratory Judgment Act "gave the

federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Associates v. Rickover,* 369 U.S. 111, 112, 82 S. Ct. 580, 581-82 (1962). This discretion, however, is not unfettered and a district court cannot decline such an action as a "matter of whim or personal disinclination." *Id.*

In deciding whether to exercise this discretionary jurisdiction over the federal declaratory action, the Court must look to several factors. The Ninth Circuit analyzed *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491, 62 S. Ct. 1173 (1942), and its progeny and stated:

> The *Brillhart* factors remain the philosophic touchstone for the district court. The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation. **If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. The pendency of a state court action does not, of itself, require a district court to refuse federal declaratory relief. Nonetheless, federal courts should generally decline to entertain reactive declaratory actions.** *Government Employees Ins. Co. v. Dizol,* 133 F.3d 1220, 1225 (1998) (citations omitted and emphasis added).

Based on the Ninth Circuit's guidance, the Court declines to exercise its discretionary jurisdiction under the Declaratory Judgment Act. In this case, there is an ongoing, identical action in Superior Court of Guam. As discussed

above in the analysis under the *Younger* abstention doctrine, the plaintiff will have an adequate opportunity to litigate the Organic Act claim before the Superior Court of Guam. There is also a compelling reason to have this matter decided by the local courts since it involves important local issues regarding the ability to set legal policy for the Government of Guam, The federal court will not get embroiled in this "intra-governmental dispute" between the Attorney General and the Executive Branch. The Declaratory Judgment Act was not meant for these types of actions. Accordingly, the Court grants the motion to dismiss.

CONCLUSION

In conclusion, the Court hereby DENIES the Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party. Additionally, the Court DENIES IN PART AND GRANTS IN PART the Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Court finds that it has jurisdiction because this action arises under federal law, however, the Court will abstain from exercising such jurisdiction based on the *Younger* and *Burford* abstention doctrines. Finally, the Court GRANTS the Motion to Dismiss Based on Unsuitability of Declaratory Relief. Accordingly, this case is hereby DISMISSED.

SO ORDERED this 31st day of March, 2003.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District judge

Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

(4)

No. 04-1480

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN, Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY, by and through its Board of Directors,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the Territory of Guam

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Robert M. Weinberg*
Assistant Attorney General
Office of the Attorney General of Guam
287 West O'Brien Drive
Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493 (Fax)

**Counsel of Record for Petitioner*

QUESTION PRESENTED

Whether, in the absence of express authority from the United States Congress, the local Legislature for the Territory of Guam may alter, abridge, restrict or modify the powers and duties of the Attorney General of Guam, an Office established in the Organic Act of Guam by the United States Congress.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 2

I. THIS CASE INVOLVES SUBSTANTIAL AND DISPUTED MATTERS OF FEDERAL CONCERN AND CONGRESSIONAL INTENT. 2

II. FEDERAL PREEMPTION IS INAPPLICABLE TO THE ISSUES PRESENTED. 6

III. THAT THE POWER OF THE LOCAL LEGISLATURE "SHALL EXTEND TO ALL RIGHTFUL SUBJECTS" DOES NOT INCLUDE THE POWER TO NULLIFY AN ACT OF CONGRESS. 6

IV. RESPONDENT'S ARGUMENTS ON THE MERITS ARE PREMATURE AND DISTINGUISHABLE. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

American Legion Post No. 279 v. Barrett, 20 N.E.2d 45 (Ill. 1939) 9

Attorney General of Guam v. Thompson, Civ. Case 03-00008 (D. Guam) 3

Brillhart v. Excess Ins. Co. of America, 316 U.S. 419 62 S. Ct. 1173 (1942) 4

Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098 (1943) 3, 4

Chase Manhattan Bank (National Association) v. South Acres Development Co., 434 U.S. 236, 98 S. Ct. 544 (1978) 2

Department of Mental Health v. Coty, 232 N.E.2d 686 (Ill. 1967) 9

Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) 6, 7, 10

Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth., 456 N.E.2d 50 (Ill. 1983) 8

Gutierrez v. Ada, 528 U.S. 250, 120 S. Ct. 740 (2000) 2

Lyons v. Ryan, 201 Ill.2d 529, 780 N.E.2d 1098 (Ill. 2002) 9

People ex rel. Castle v. Daniels, 132 N.E.2d 507 (Ill. 1956) 9

People ex rel. Hartigan v. E. & E. Hauling, Inc.

607 N.E.2d 165 (Ill. 1992) 8

Renell v. Southall Realty, 416 U.S. 363, 94 S.Ct. 1723 (1974) 7

Territory of Guam v. Olsen, 431 U.S. 195, 97 S. Ct. 1774 (1977) 2

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) 3, 4

Statutes

48 U.S.C. § 1421g(d)(1) 1

48 U.S.C. § 1423a 6

INTRODUCTION

The decision of the Supreme Court of Guam is premised on a legally untenable proposition: That Congress may create the Office of Attorney General and Chief Legal Officer Government of Guam, in the Organic Act of Guam, 48 U.S.C. § 1421g(d)(1), but that the local Legislature of Guam may by local law, and without express authority delegated from Congress, alter, abridge, restrict or modify the powers and duties of that Office to the degree that it renders the Congressional enactment meaningless. The Guam Supreme Court's finding of implied authority delegated to the Legislature of Guam that is expressly delegated with respect to every other office described with the same provision of the law is an affront to Congressional intent and this Court's standards of statutory construction.

Respondent's Brief in Opposition to Petition for Writ of Certiorari demonstrates precisely why the decision of the Guam Supreme Court is in error. It argues a point not in dispute – that state and territorial courts are presumed competent to decide issues of federal law – in order to avoid addressing the merits of the argument that in this instance the Supreme Court of Guam misinterpreted federal law and misapplied this Court's standards of statutory construction in ascertaining Congressional intent. In contradistinction to almost every other local office mentioned in the Organic Act of Guam, Congress intentionally declined to authorize the local Legislature to define the parameters of the authority conferred upon the Attorney General and Chief Legal Officer for the Government of Guam.

Respondent's "preemption" discussion is non-responsive to the question of Congressional intent in amending the Organic Act. And Respondent's citation to case law from distinguishable jurisdictions which purports to

address the merits of its arguments in opposition to the question presented is simply premature.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES SUBSTANTIAL AND DISPUTED MATTERS OF FEDERAL CONCERN AND CONGRESSIONAL INTENT.

By Respondent's reasoning, no case arising under the Organic Act of Guam seeking an interpretation of Congressional intent would present an issue worthy of review by this Court. But such reasoning is directly contrary to this Court's analysis of the *federal* concerns in granting certiorari in *Territory of Guam v. Olsen,* 431 U.S. 195, 97 S. Ct. 1774 (1977); *Chase Manhattan Bank (National Association) v. South Acres Development Co.*, 434 U.S. 236, 98 S. Ct. 544 (1978) (per curiam); and *Gutierrez v. Ada*, 528 U.S. 250, 120 S. Ct. 740 (2000). And Respondent's facile distinctions of this Court's precedents, and characterization of the question presented as a mere "intergovernmental dispute," Opposition at p. 13, are simply unresponsive to the fact that a local territorial court has misconstrued a federal law to the effect that Congressional intent is nullified.

Respondent correctly characterizes this Court's holding in *Olsen* to be that "the Guam Legislature was not authorized to divest the local federal court, the District Court of Guam, of appellate jurisdiction in cases turning on questions of federal law," but seeks to distinguish it on the basis that "the instant case implicates no such attempt to deprive the District Court of any jurisdiction." Opp. Brief at pp. 12, 13. But Respondent misses the point entirely. In *Olsen*, Congress created an Article IV court, and this Court

held that the local Legislature was without express authority to limit its jurisdiction in federal question cases. "[W]e should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law." *Olsen*, 431 U.S. at 201, 97 S. Ct. at 1778-79. In the instant case, absent express authority and a "clear signal from Congress" which established the Office of Attorney General in the Organic Act, the Legislature of Guam is not authorized to alter, amend, abridge or modify the powers and duties of that Office.

In the case filed first in the District Court of Guam by the Attorney General of Guam against the Airport Manager, *Attorney General of Guam v. Thompson,* Civ. 03-00008, *see* Opposition, App. 1, the District Court of Guam acknowledged that there it had federal question jurisdiction to hear the matter, but then invoked *Younger* and *Burford* abstention to decline jurisdiction over a decidedly federal question of law.[1] The District Court also purported to

---

[1] *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971); and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943). Respondent's misdirected references to the District Court of Guam's reversible error in abstaining from deciding the identical question presented in the "closely-related federal case entitled, *Attorney General of Guam v. William R. Thompson*, D. Guam Civ. Case No. CV03-00008," Opposition, pp. 1, 6 and 12, and appendix, merely demonstrate not only that the Supreme Court of Guam was in error, but that Respondent was also able to persuade a federal district court to abdicate its unflagging obligation to decide properly presented questions of federal law as well. Assuming the Attorney General prevails on appeal, and the Ninth Circuit reverses and remands the District Court of Guam's abstention order, if this Court does not grant certiorari and review the decision of the Supreme Court of Guam, the Respondent will likely invoke the Rooker-Feldman doctine, and *res judicata* to the effect that this pure question of federal law and Congressional intent in amending the Organic Act of Guam will escape substantive review by any federal court.

exercise its "discretion" to decline jurisdiction under the so-called *Brillhart* factors, *see Brillhart v. Excess Ins. Co. of America*, 316 U.S. 419, 62 S. Ct. 1173 (1942).[2] But that court was in error to abstain for the same reasons that this case raises an issue of substantial federal concern that is due to be heard by this Court.

That Congress was aware of the mischief that would follow if agencies and instrumentalities were permitted to retain their own attorneys who were not answerable to one Chief Legal Counsel is demonstrated by two letters, one from the Compiler of Laws to Delegate Underwood dated July 16, 1997 forewarning Congress of the evils of the existing system on Guam with its multiple legal fiefdoms; and one dated April 2, 2003 to the Attorney General by counsel for the Guam International Airport Authority after the amendment to the Organic Act had become law.

Respondent's Opposition at page 4 quotes from the July 16, 1997 letter from the Compiler of Laws, Charles H. Troutman to Congressman Robert Underwood. Respondent is correct to note that the Compiler did not see the use of outside counsel as something that should eliminated. But Mr.

---

[2] The *Brillhart* factors have only been applied in actions where jurisdiction was based on diversity of citizenship, as opposed to federal question jurisdiction, and where the questions to be decided involved the interpretation of state, not federal, law. "Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the same parties." *Id.* 316 U.S. 495, 62 S. Ct. 1175-76 (emphasis added). The District Court unquestionably erred in its analysis of *Younger* and *Burford* abstention, and in its application of *Brillhart*. That matter is presently pending on appeal before the Ninth Circuit, but unless this Court grants certiorari in this case, a reversal by the Ninth Circuit will still not address the federal issue presented.

Troutman went on to state that an important purpose to be served in amending the Organic Act was to keep a check on the various legal empires within the government of Guam.[3] Based in experience, Mr. Troutman's concerns became reality in this very case. On April 2, 2003, counsel for the Airport Authority sent the Attorney General a letter purporting to direct the relationship between the Attorney General and the Authority with respect to the Attorney General's efforts to conduct criminal investigations, which by necessity require the cooperation of an agency and instrumentality of the Government of Guam. The letter from the Airport Authority's counsel in part *commands*: "Inasmuch as this firm represents GIAA in all of its legal affairs . . . you are required to communicate with GIAA through our office." Letter from David Mair to Attorney General, Appendix to Reply to Opposition, at A-2, 3. The intent of this peremptory language, and the effect of the decision of the Guam Supreme Court, was to remove from the Attorney General and "Chief Legal Officer of the Government of Guam" any legal oversight or participation in the legal affairs of an instrumentality of the Government of Guam, unless its *private* counsel permits it. Had Congress intended that result, in need not have amended the Organic Act in the first place.

---

[3] Mr. Troutman wrote, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the Government of Guam. This is the same idea expressed in the 1970 Illinois Constitution." Pet. App. D-2. The question thus has always been who would be authorized under Guam's Organic Act to keep a "check on having many and diverse legal 'empires' within the Government of Guam." It will be significant to the analysis on the merits of this petition that the Illinois model was suggested by the Compiler as a point of reference.

II. FEDERAL PREEMPTION IS INAPPLICABLE TO THE ISSUES PRESENTED.

Respondent argues correctly that "this Court starts with the presumption that the power of the states are not to be superceded by federal law," Opposition, p. 25. But Guam is not a state and, unlike the several states, the powers of its Legislature are express and defined delegations of legislative authority from Congress, not inherent powers of a sovereign. As noted by the Ninth Circuit U.S. Court of Appeals, "Congress has the power to legislate directly for Guam or to establish a government for Guam subject to congressional control, and except as Congress may determine, Guam has no inherent right to govern itself." *Guam v. Guerrero,* 290 F.3d 1210, 1214 (9th Cir. 2002) (citations omitted).

Federal "preemption" of local laws is a non-issue; what is the issue is what authority Congress intended to delegate to the local Legislature to define the powers and duties of the Attorney General for the Territory of Guam.

III. THAT THE POWER OF THE LOCAL LEGISLATURE "SHALL EXTEND TO ALL RIGHTFUL SUBJECTS" DOES NOT INCLUDE THE POWER TO NULLIFY AN ACT OF CONGRESS.

The fact that the Organic Act of Guam now provides that the power of the local Legislature shall extend to "all rightful subjects of legislation," by its own terms expressly limits that power to those "subjects of legislation not inconsistent with the provisions of this chapter [Organic Act] and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. The question presented here is whether the local Legislature has been delegated the authority to legislate in this field at all, for if not, the exercise of such powers is "inconsistent with the provision of" the Organic Act.

Respondent trivializes the substantial federal question of Congressional intent in determining the parameters of Guam's self-governance, to reduce it to a mere territorial decision "of local concern," as though this were an issue of local law passed by the local Legislature whose interpretation by the local courts is entitled to deference.[4] Opposition at pp. 10, 11. But no presumption of deference is due, because an interpretation by local courts of *local* laws is not the issue. The issue is whether a local Legislature is even authorized by *federal* law to enact the laws in question. Reviewing a decision of the Guam Supreme Court interpreting the Organic Act, the Ninth Circuit has opined that, although courts will give deference to interpretation of local issues, "we cannot ignore the fact that § 1421b(a) is a federal statute dealing with an issue of federal constitutional import, not a local law. As such, we employ a de novo standard of review" *Guerrero*, 290 F.3d at p. 1214. No deference is due to the local courts when interpreting what *Congress* intended in amending Guam's Organic Act.

IV. RESPONDENT'S ARGUMENTS ON THE MERITS ARE PREMATURE AND DISTINGUISHABLE.

At pp. 19 – 21, and 24 of its Opposition, Respondent cites case law from Kentucky, Missouri, North Dakota, Arizona, Utah, New Jersey, New York, California,

---

[4] Had Congress considered the Office of Attorney General to be merely a matter of "peculiarly local, territorial concern," Opposition, p. 10, Respondent's arguments may have some weight. But even under *Renell v. Southall Realty*, 416 U.S. 363, 94 S.Ct. 1723 (1974), cited at pp. 10, 11 of Respondent's brief, the conclusion is ineluctable that the court below committed "egregious error," *id.*, 416 U.S. at 368-369, 94 S.Ct. at 1726. Congress did not delegate to the local Legislature the authority to "prescribe by law" the parameters of the Attorney General's powers and duties, as it had elsewhere in the Organic Act of Guam for other offices it established or authorized the local Legislature to create.